No. 96-270

In the Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., ET AL.,
Petitioners

v.

GEORGE WINDSOR, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents' briefs are notable in three respects. *First*, despite the deluge of paper filed with the Court, there is *no defense* of the Third Circuit's ruling on the sole issue on which certiorari has been granted. Indeed, most respondents *explicitly admit* that a court *should* take the parties' settlement into account in applying the class certification standards of Rule 23. Unable to justify the Third Circuit's actual holding, respondents attack a straw man; they falsely claim that we are arguing that the settlement overrides or weakens the requirements for certification. But that emphatically is not our contention. Our point, instead, is simply that a court, in applying the standards spelled out in Rule 23, should not close its eyes to the reality of a settlement.

Once the settlement is taken into account, it is clear that the district court did not abuse its discretion in certifying this class. Respondents' argument that there are intra-class conflicts is refuted by the district court's factual findings that class members were not competing for limited funds and, because of the nature of asbestos-related injuries, share an interest in maximizing the compensation provided for each disease category. Likewise, the district court's findings as to why this settlement is fair to all class members and better for all of the parties than continued case-by-case litigation foreclose respondents' challenge to the superiority determination.

Second, respondents advance a variety of constitutional arguments that were not addressed by the court of appeals. Those contentions, which were thoroughly refuted by the district court, are meritless. The plaintiffs, who allege bodily injury and other concrete harms, plainly have standing; the amount in controversy requirement is amply satisfied where, as in this case, plaintiffs have recovered sums in excess of the jurisdictional amount for claims of the type now advanced; and respondents' challenges to the adversarial nature of the parties and to the class notice are simply irreconcilable with the district court's unchallenged factual findings.

Third, seeking to twist the equities in their favor, respondents resort to numerous assertions about the settlement that are contrary to the district court's exhaustive findings of fact (*e.g.*, Pet. App. 103a-223a). For example:

- Respondents assert that "the compensation provided by the settlement [is] far below average awards in the tort system." Windsor Br. 5; see also WLA Br. 3; Cargile Br. 6, 39. *In fact*,

the district court, based on six pages of detailed findings (Pet. App. 136a-142a), found that "the values in the Compensation Schedule are indeed a reasonable reflection of the CCR defendants' historical settlement averages from the tort system" (*id.* at 139a).

- Respondents assert that there "likely" will be too many claims and that payments "could be delayed for many years." WLA Br. 4; see Windsor Br. 5. *In fact*, the district court found that the settlement "will result in less delay for asbestos claimants than that experienced in the present tort system" (Pet. App. 146a) and will "result in the CCR defendants paying more claims, at a faster rate, than they have ever paid in the past" (*id.* at 143a).

- Respondents assert that non-impaired class members will "receive nothing at all" under the settlement (*e.g.*, Balonis Br. 20), whereas they receive "substantial amounts of money" in the tort system (WLA Br. 44; see also Cargile Br. 6). *In fact*, the district court found that the settlement provides benefits of "significant value" to non-impaired class members (Pet. App. 174a) — including tolling of the statute of limitations, waiver of defenses to liability, prompt and efficient payment if and when they become sick, assurance that such funds will be available, and the right to be compensated twice if their medical condition worsens. *Id.* at 172a & n.39, 173a-175a. The court also found that, *in fact*, "non-impaired claimants [in the tort system] usually settle their claims for small amounts and a full release of all claims for any future asbestos-related injury, including cancer." *Id.* at 175a.

- Respondents assert that petitioners paid a "premium" to settle some of class counsel's previously filed cases (Windsor Br. 6; see also WLA Br. 2). *In fact*, the district court found that the terms of those settlements were "generally consistent with historical settlement averages." Pet. App. 213a.

- Respondents assert that the asbestos litigation crisis is abating (Balonis Br. 42-43). *In fact*, the district court found that "[n]ew filings continue unchecked, there is much uncertainty as to liability and verdict results, claims are often resolved only after long delays, transaction costs are high, and victims receive only a fraction of the funds expended." Pet. App. 240a; see *id.* at 270a.

As these examples show, respondents' scattershot attacks on the settlement are meritless. The district court approved the settlement based on exhaustive findings (Pet. App. 88a-276a); respondents did not seek to challenge those findings on appeal; and none of the findings was set aside by the Third Circuit. The settlement has been supported by the national AFL-CIO, whose members include a "substantial percentage" of the class (*id.* at 247a), and by numerous plaintiffs' asbestos attorneys (J.A. 862). Its terms create the kind of claims resolution system that was endorsed by the Judicial Conference committee appointed by Chief Justice Rehnquist. Pet. App. 112a, 270a. And, as the district court found, there were "few actual objectors to the settlement"; indeed, most of them "were submitted as *one* group represented by *one* law firm." *Id.* at 247a & n.60 (emphasis in original).

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CERTIFYING THE CLASS.

Although respondents make a number of mutually inconsistent arguments, they all agree on one point: a settlement *may* be taken into account in deciding whether to certify a class. They thus concede the issue on which this Court granted certiorari. See Cargile Br. 1, 13 (disavowing the Third Circuit's "extreme" holding and "agree[ing] that the settlement and its fairness should not be ignored in assessing class certification"); Windsor Br. 27 ("a court need not close its eyes to the substantive terms of a settlement"); WLA Br. 36 n.17 ("Rule 23's text permits the district court to consider a settlement's effect on case management"). The Balonis respondents make the concession by silence; they offer no defense of the Third Circuit's holding.

All aspects of the Third Circuit's decision were fatally infected by its concededly erroneous holding that the requirements of Rule 23 "must be satisfied without taking into account the settlement." Pet. App. 39a. Respondents plainly err in their remarkable assertion (Windsor Br. 2, 26; Cargile Br. 9-10, 14) that the court of appeals disregarded its own holding and took the settlement into account in deciding that the requirements of Rule 23 were not met: the court *twice* expressly held that "this class, *considered as a litigation class*, cannot meet the [Rule] 23(a) requirements of typicality and adequacy of representation, nor the 23(b) requirements of predominance and superiority." Pet. App. 39a-40a (emphasis add-

ed); see also *id.* at 19a-20a.[1] The decision below therefore must be set aside.

A. Rule 23 Permits The Court To Take The Settlement Into Account.

Rather than defend the Third Circuit's ruling that the settlement must be *ignored*, respondents argue at length that the certification standards "cannot be satisfied *solely* by the substantive terms of a settlement," *i.e.*, that the fairness inquiry under Rule 23(e) "is not designed to substitute" for those standards. Windsor Br. 27 (emphasis added), 31; see also *id.* at 27-31; WLA Br. 34-35; Cargile Br. 24-25; Balonis Br. 19. These caricatures misstate our argument and the district court's decision. As we made clear throughout our opening brief, "a district court that takes settlement into account is still obligated to conduct the certification inquiry specified in Rule 23." Pet. Br. 40; see also, *e.g.*, *id.* at 28-29. Our *actual* argument, and the district court's *actual* holding (see Pet. App. 223a-233a), is that a court must apply the criteria spelled out in Rule 23(a) and (b) to the real case before it. The court should take into account the settlement-related facts (including the settlement terms and history of negotiations) that shed light on the Rule 23 standards. But it need not deny certification based on manageability and similar problems that will never come to pass. As the Fourth Circuit put it, "settlement should be a factor, and an important factor, to be considered when determining certification." *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir. 1989).

Respondents' Rule 23 arguments are directed primarily at their mischaracterization of our position. The Windsor respondents suggest that a case that is not "triable" should not be certified "*solely* by reliance on the * * * settlement" (Windsor Br. 27-28 (emphasis added)) — but that is not our position. And contrary to respondents' vague suggestion that the Rule is directed to cases that are "triable," nothing in the inclusive language of Rule 23 says that the "questions of law or fact" and the "claims" referred to in Rule

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[1] Respondents made this same argument in opposing the petition for certiorari (Windsor Op. 10; WLA Op. 10-12), and we rebutted it in our reply (at 6 & n.6). This Court presumably rejected respondents' argument when it granted review.

23(a) must be part of a suit determined to be "triable"; likewise, nothing in the Rule excludes questions or claims that *are* before the court as a consequence of settlement. Respondents do not even attempt to rebut the showing in our opening brief (at 18-25) that the text of Rule 23(a), (b), and (c) directs the certification inquiry to the *actual* status of the case, including settlement, rather than to the purely hypothetical question of whether the now-settled case was "triable." See 7B WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1785, at 107 & n.34 (1986) (the certification "determination usually should be predicated on more information than the complaint itself affords," including the "factual circumstances of a particular case").[2]

Likewise, respondents' argument that settlement classes pose an inordinate risk of collusion is premised on their false assumption that we advocate "collapsing the entire certification inquiry into an examination of the settlement's fairness." Windsor Br. 29. In fact, some possibility of collusion exists in *all* settlement classes, not only those in which the case could not be certified for trial. But as the decision upon which respondents principally rely itself makes clear, the courts uniformly have rejected the proposition that this danger renders the settlement class procedure "a per se violation of Rule 23," holding instead that the possibility of collusion is adequately addressed by "careful scrutiny" on the part of the district court. *Mars Steel Corp.* v. *Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 681 (7th Cir. 1987); see also Pet. Br. 40. And as we explained in our opening brief (at 22-25),

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[2] The Cargile respondents argue (at 15, 21) that the predominance requirement of Rule 23(b)(3) should be resolved without reference to the settlement in order to ensure a "cohesive" class. That argument finds no support in the language of the Rule. Indeed, many of the factors that Rule 23(b)(3) expressly lists as pertinent to the predominance and superiority inquiries are significantly affected by a settlement. Pet. Br. 30-31. Moreover, the Advisory Committee Notes establish that the predominance requirement is designed to achieve "economies" by ensuring that the class action will not break down "into multiple lawsuits separately tried" — a danger that cannot materialize when the case has settled. Pet. Br. 30. A "cohesive" class is assured by the typicality and adequacy requirements of Rule 23(a).

lower courts have taken settlement into account in applying the Rule 23 criteria for three decades and have had no difficulty preventing abuses. See *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345 (1979) (class action abuses will not occur if district courts "exercise sound discretion and use the tools available" under Rule 23).[3]

In fact, as we also explained in our opening brief (at 28-29 40), and as respondents do not deny, taking the settlement into account *improves* the quality of the certification decision and gives *enhanced* protection to absent class members. It allows the district court to assess the actual performance of the class representatives and counsel. It gives the court the opportunity to review the course of the negotiations and the substance of the settlement, which may "expose diverging interests or common issues that were not evident or clear from the complaint." *In re Asbestos Litig.*, 90 F.3d 963, 975 (5th Cir. 1996). And review of the settlement terms makes concrete the inquiry into whether a class action is superior to other means of adjudication. Consideration of the settlement thus throws considerable light on many of "the imponderables that make the [class-action] decision so difficult early in [the] litigation." *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 406 n.12 (1977) (citation omitted).

Nor can respondents rebut the demonstration in our opening brief (at 34-39) that requiring the district court to find that the case could have been tried would have enormous adverse consequences for the parties and the courts. Such a rule would make it virtually impossible for the parties to settle any case before class certification; it would bar classwide settlements in the many securities, civil rights, and antitrust cases where damages and other issues are

[3] Respondents attack the same straw man in arguing that the fairness of the settlement should not override the certification inquiry because class counsel in a settlement case "cannot use the threat of litigation as leverage." Windsor Br. 33. Plaintiffs ordinarily do not — and plaintiffs in this case did not — concede that their case could not be certified for litigation; thus such leverage exists unless and until the court determines that the class is *not* triable. Moreover, the threat that, absent a class settlement, the defendants would continue to face an onslaught of literally thousands of individual cases gave the plaintiffs here abundant leverage to secure a fair settlement.

too varied to try as a class (thus denying *any* relief to plaintiffs in many such cases); and it would foreclose the use of class actions to settle mass tort cases. Nothing in the Rule requires such an untoward result.[4]

B. Taking The Settlement Into Account, The District Court Did Not Abuse Its Discretion In Certifying The Class.

While the court of appeals refused to consider the settlement, the district court took the settlement into account in applying the criteria of Rule 23(a) and (b). Not surprisingly, most respondents fail to mention the standard that governs review of the district court's decision; the Windsor respondents assert (at 46) that adequacy of representation is subject to de novo review. It is black-letter law, however, that "the court's [certification] decision will not be disturbed on appeal unless it is shown to be an abuse of * * * discretion." 7A FEDERAL PRACTICE AND PROCEDURE § 1765, at 273; see *Califano* v. *Yamasaki*, 442 U.S. 682, 703 (1979) (certification upheld where "we cannot conclude that the District Court * * * abused [its] discretion"); *Reiter*, 442 U.S. at 345 (district courts "have broad power and discretion * * * with respect to matters involving the certification" of class actions).

Deference to the district court's decision is especially appropriate here. "Familiar with the issues and litigants, the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard" mandated by Rule 23. *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 402 (1990). Here, the district judge "lived with the controversy for weeks or months instead of just a few hours." *Bose Corp.* v. *Consumers Union, Inc.*, 466 U.S. 485, 500 (1984). The court held a five-week hearing, heard from 29 witnesses (including medical, financial, and ethics experts), and made truly exhaustive findings of fact. Pet. App. 101a-223a. Those findings necessarily underlay the district court's certification decision: "[w]hat constitutes ade-

[4] Respondents' radical argument that our position is "problematic" under the Rules Enabling Act (Windsor Br. 36-40) was not raised below, is equally applicable to *all* settlements of nationwide class actions, and lacks any remotely relevant supporting authority.

quate representation is a question of fact that depends on the circumstances of each case." 7A FEDERAL PRACTICE AND PROCEDURE § 1765, at 271.[5]

The court of appeals, however, made no "mention * * * of the factual findings of the District Court, much less discuss or analyze them." *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 713 (1986). Instead, the Third Circuit engaged in plenary review of the certification question. Indeed, as we noted in our opening brief (at 44 n.22) — and as respondents pointedly do not deny — the court of appeals premised its holding on factual assertions that are *flatly contradicted by the district court's findings of fact*.[6] The court of appeals did so, moreover, without acknowledging those findings, without determining that any of them were clearly erroneous, and without so much as citing the evidentiary record. Thus, even apart from its erroneous decision to ignore the settlement, the court of

[5] The Windsor respondents make much of the fact that a few of the district court's findings appear under the heading "conclusions of law." Br. 46. In fact, the court emphasized that "[t]o the extent that these conclusions of law include findings of fact or mixed findings of fact and conclusions of law, those findings and conclusions are hereby adopted by this Court." Pet. App. 223 n.53. In addition, "[a]n appellate court will regard a finding or conclusion for what it is, regardless of the label the trial court may have put on it." 9A FEDERAL PRACTICE AND PROCEDURE § 2579, at 537 & n.2.

[6] For example, in reaching its conclusion that there are intra-class conflicts, the court of appeals asserted that the settlement "relegates" mesothelioma victims "to a modest recovery, whereas the average recovery of mesothelioma plaintiffs in the tort system runs into the millions of dollars." Pet. App. 49a; see *id.* at 50a n.14. Respondents repeat this assertion, arguing that mesothelioma claims from California are undercompensated by the settlement. Windsor Br. 5-6 n.5. In fact, however, the district court found that the compensation values for *each* disease category correctly reflect the actual historical settlement data. Pet. App. 136a-142a. Thus, the evidence shows that petitioners' average tort system payment for California mesothelioma claims ($52,405, see J.A. 562) is well within the schedule set by the settlement (non-extraordinary claims are paid an *average* of up to $60,000, with extraordinary claims *averaging* $300,000). See Pet. App. 274a.

appeals' application of the Rule 23 factors is fatally flawed and must be set aside. See *Icicle Seafoods*, 475 U.S. at 714.

When considered under the deferential standard of review required by Fed. R. Civ. P. 52(a) and this Court's precedents, the district court's decision to certify the class was unassailable.

1. *Adequacy of representation*. Respondents parrot the court of appeals' assertion that "serious intra-class conflicts" preclude a finding of adequate representation, with the "most salient conflict" between "presently injured and futures plaintiffs." Pet. App. 49a; Windsor Br. 45-46. The Windsor respondents assert (at 46) that some plaintiffs got recoveries "at the expense of others," while the WLA respondents claim (at 44-45) that some plaintiffs' claims were extinguished without adequate compensation. None of these assertions can be squared with the district court's factual findings.

First, the district court found that "the assets of the defendants do not constitute a limited fund, and so Class Counsel was able to negotiate compensation schedules for varying diseases *without competition between medical categories for the same dollars*." Pet. App. 230a (emphasis added) (citing Findings of Fact 142-170). As a consequence, the district court found, there was "no antagonism between persons in various categories" (*ibid.*; see also *id.* at 232a), a ruling that comports with recent decisions of the Second and Fifth Circuits in class actions involving "present" and "future" disease victims. See *Ivy* v. *Diamond Shamrock Chem. Co.*, 996 F.2d 1425, 1435-1436 (2d Cir. 1993) ("*Agent Orange*"); *In re Asbestos Litig.*, 90 F.3d at 978-982.[7] To be sure, all plaintiffs might not have had the same immediate goal in mind; the court of appeals, for example, speculated that presently impaired class members might be interested in getting full value for their claims immediately, while non-impaired plaintiffs would want to preserve funds for people who become sick in the future. But those goals simply were not "antagonistic" because, as the district court found,

[7] A conflict exists only where class members' interests are "antagonistic." *E.g.*, *In re Joint E. & S. Dist. Asbestos Litig.*, 78 F.3d 764, 778 (2d Cir. 1996); *Kanter* v. *Casey*, 43 F.3d 48, 55 (3d Cir. 1994); *Rosario* v. *Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992).

there was no competition between the groups "for the same dollars." Pet. App. 230a.

Respondents' hypothetical conflicts between "present" and "futures" class members are further refuted by the district court's factual finding that the distinction between those groups is "illusory" because "[c]lass members with no current asbestos-related condition may develop serious conditions in the future." Pet. App. 232a. As such, non-impaired claimants "have a strong interest that recovery for *all* of the medical categories be maximized because *they may have claims in any, or several categories*." *Id.* at 231a (emphasis added). Thus, both "present" and "futures" class members had an interest in maximizing the scheduled payments and obtaining favorable eligibility conditions for *each* medical category. Equally important, respondents have no response to our demonstration that all plaintiffs were united by their interest in achieving a global settlement. See Pet. Br. 48.

The absence of any conflict among class members was confirmed by the district court's factual finding that *each* category of class members will receive "fair and reasonable" value for their claims. Non-impaired class members secure a package of benefits (including tolling of limitations, waiver of defenses, quick payment when they become sick, reduced transaction costs, and assurance that funds will be available) that is superior to what they would get in the tort system. Pet. App. 139a & n.23, 141a, 172a & n.39, 173a-176a. Sick class members receive compensation, based on objective, historical settlement data, faster and with lower transaction costs. *Id.* at 136a-139a, 268a. Many witnesses testified that this formula is advantageous for everybody. *E.g.*, J.A. 354-356, 363-364, 395-396.

In this factual setting, where the various plaintiffs' aims are not in conflict, respondents' arguments involve nothing more than second-guessing the sort of compromises that are inherent in all settlements. Respondents complain, for example, that non-impaired plaintiffs did not obtain relief in the forms of programs for medical monitoring or inflation adjustments (Windsor Br. 46) — but respondents ignore the district court's finding that those plaintiffs received a set of benefits with more value than the "small amounts" they typically get in return for complete releases in the tort system.

Pet. App. 173a-175a.[8] Respondents' grousing about these trade-offs simply does not raise an issue of adequacy of representation.

The district court's fact-intensive adequacy determination plainly is due the greatest deference. The district court reviewed the history of settlement negotiations in this case, finding that they were "difficult, lengthy, and time-consuming" (Pet. App. 116a) and that the settlement is "the product of non-collusive negotiations." *Id.* at 204a. See also *id.* at 177a-179a, 204a-216a. The court also found that there was no intra-class conflict because the various groups of plaintiffs were pursuing consistent goals. *Id.* at 229a-231a. And the court was able to *confirm* that conclusion by looking to the actual results of the negotiations, finding that under the settlement non-impaired class members fare better than they do in the tort system, while presently-impaired class members receive payments that reflect historical tort system averages. Against this background, the district court's adequacy determination plainly has not been shown to be an abuse of discretion.

2. *Superiority*. Respondents argue that the superiority requirement of Rule 23(b)(3) is not satisfied because the purported difficulties in giving notice outweigh any advantages stemming from the settlement. Windsor Br. 48-49. This argument ignores the district court's many factual findings and flies in the face of the deference due that court on the question of superiority.

Based on more than 100 subsidiary findings, the district court found that the settlement is superior because, *inter alia*, it "will provide class members with fair compensation for their claims while reducing the delays and transaction costs endemic to the asbestos litigation process as it occurs presently in the tort system." Pet. App. 227a-228a; see also *id.* at 270a (in the tort system, "the

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[8] The WLA respondents' complaint (at 45) that "the settlement extinguishes the loss-of-consortium claims without any cash recovery" and "thus enriches some claimants at the expense of others" typifies respondents' persistent disregard of the district court's factual findings. The court found that "the CCR defendants' historical [settlement] averages, upon which the compensation values are based, *include payments for loss of consortium claims*, and, accordingly, the Compensation Schedule is not unfair for this ascribed reason." Pet. App. 141a (emphasis added).

lawyers are well paid" but "victims' recoveries are delayed [and] excessively reduced by transaction costs"; also, "[t]he sickest of victims often go uncompensated" while "funds go to others who remain unimpaired"). Needless to say, respondents are unable to demonstrate that these many findings are clearly erroneous.

Similarly, the purported inadequacies in the notice to class members do not undermine class certification. As discussed at pages 26-30 below, the assertions about notice contradict the district court's factual findings and its "confident" conclusion that class members got fair notice. Pet. App. 272a. Indeed, because the notice complied with the express requirements of Rule 23(c)(2), it would be anomalous to conclude that it was so deficient as to bar certification under the general superiority test of Rule 23(b)(3). Moreover, those concerns do not cast doubt on the district court's discretionary judgment that the settlement is superior to continued case-by-case litigation in the tort system.

3. *Typicality*. Respondents' passing reference to typicality echoes the court of appeals' theory that "the futures plaintiffs share too little in common [with one another] to generate a typical representative." Pet. App. 53a. The WLA respondents argue (at 34) that "because the settlement releases the future claims of class members whose injuries, desires, and even identities are unknown and unknowable, no class representative can be typical of the 'futures' class." But that argument is plainly wrong. As the district court found, each non-impaired class member "may in the future develop a condition in any one or more of the compensable medical categories." Pet. App. 231a. As a consequence, they *currently* are situated *identically* to one another, and they currently have precisely the *same* interests. *Id.* at 232a.

The WLA respondents (at 34) also seek to rely on *General Telephone Co.* v. *Falcon*, 457 U.S. 147 (1982), where, they assert, "the Court held that a Mexican-American employee, who was denied a workplace *promotion*, was not typical of a class of Mexican-American job *applicants*." In fact, the Court made clear in *Falcon* that, if an employer uses "a biased testing procedure to evaluate both applicants and current employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a)." 457 U.S. at 159 n.15.

That reasoning plainly applies in this case, where all plaintiffs complain that they were wronged by the same conduct (exposure to asbestos) and all benefit from the same negotiated remedy.[9]

More generally, as the district court found, "the representative plaintiffs hail from a variety of jurisdictions and represent a wide range of occupations, medical conditions, and exposure to the CCR defendants' products." Pet. App. 105a. These class representatives include both non-impaired and sick claimants, as well as their spouses. *Id.* at 103a-105a. Hence the typicality requirement is amply satisfied.[10]

4. *Predominance of common questions*. As we showed in our opening brief (at 42-43), the settlement made irrelevant all of the disparate issues as to liability, defenses, and damages on which the Third Circuit relied in finding that common issues do not pre-

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[9] For this reason (among others), the Windsor respondents are incorrect when they assert (at Br. 26) that the class in this case is identical to one consisting of "every potential victim that an automobile manufacturer wronged in a given calendar year," including potential traffic accident, antitrust, and toxic tort plaintiffs. In contrast to the class here, respondents' hypothetical group would not have been injured by the same conduct. In addition, as a consequence of the wrongful conduct here, every member of the class ultimately may develop the same diseases, and each therefore has an interest in maximizing recovery in all disease categories; that manifestly is not true of respondents' amorphous group of accident, price-fixing, and toxic spill victims.

[10] Given the district court's finding that there is no conflict among class members, the "typicality" requirement "may be satisfied even though varying fact patterns support the claims * * * of individual class members." 7A FEDERAL PRACTICE AND PROCEDURE § 1764, at 235-236. The trial court has considerable discretion whether to create subclasses, and as the district court found here, creation of subclasses in this situation is both unnecessary and disfavored. Pet. App. 231a-233a. The court also found that "the representation of the class has been enhanced by the AFL-CIO's involvement in this litigation and its agreement to participate, along with Class Counsel, in auditing and supervising the compensation system established under the settlement." *Id.* at 231a.

dominate.[11] The questions that remained in the case were common to class members: whether it is fair and reasonable to compromise tort claims for asbestos-related injuries, with their attendant uncertainties, delays, and high transaction costs, in exchange for the specific compensation system established by the settlement. *Ibid.* The district court's finding that these common questions predominate over any individual ones was surely not clearly erroneous. See MANUAL FOR COMPLEX LITIGATION (SECOND) § 30.45, at 243 (1985) ("although 'common questions' may predominate and justify the class if the case is settled, the standards of Rule 23(b)(3) may not be met if the case must be tried").

In short, once deferential review is properly afforded to the district court's meticulous findings of fact, it is clear that the court did not abuse its discretion in certifying the class. The Third Circuit's order decertifying the class and vacating the preliminary injunction therefore cannot stand.

II. RESPONDENTS' ALTERNATIVE ARGUMENTS ARE MERITLESS.

Seeking to avoid resolution of the question on which this Court granted review, respondents advance four constitutional objections to this class action — none of which was resolved by the court of appeals and all of which were rejected by the district court. They are all unpersuasive.

A. All Class Members Have Standing.

The Windsor respondents argue (at 17-26) that class members who do not yet have either an impairing condition or pleural plaques — whom respondents call "exposure-only" plaintiffs — lack standing to sue. This argument is plainly wrong. Standing ensures that the plaintiff has a "personal stake in the outcome of the controversy." *Warth* v. *Seldin*, 422 U.S. 490, 498-499 (1975) (citation omitted). Such a "personal stake" is indisputable here: each class member alleges that his or her own body has been

[11] See 1966 Advisory Committee Note to Rule 23 ("Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense * * * ." The court may consider "the burden that separate suits would impose," both on the defendant and "upon the court calendars.").

injured by petitioners' tortious conduct (J.A. 16), and the settlement resolves those claims in return for benefits that accrue to each class member (*e.g.*, Pet. App. 173a-176a, 241a). As the district court held in a thorough opinion that was not disturbed on appeal (J.A. 185-204), and whose findings are subject to deferential review under the "clearly erroneous" standard (see *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 74 n.19 (1978)), the specific requirements for standing are amply satisfied. See *In re UNR Indus., Inc.*, 20 F.3d 766, 770 (7th Cir. 1994) (persons exposed to asbestos satisfy Article III injury test).

1. The "injury in fact" requirement is satisfied.

To qualify as "injury in fact," the plaintiff's injury need only be "distinct and palpable as opposed to merely abstract." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990) (citation omitted). Put otherwise, it need only be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citation omitted). The *present* injuries alleged by the "exposure-only" class members — including damage to lung tissue, the need to undergo and pay for medical monitoring, and increased risk of future diseases — easily satisfy these standards.

First, the complaint alleges that class members have, as a direct result of their "inhalation of asbestos fibers and dust," suffered "cellular changes in their lungs and other organs" that can result in asbestosis and cancer. J.A. 16. While respondents disparage these claims as "mere autobiography" (Windsor Br. 19), many federal and state courts have found that inhalation of asbestos *immediately* produces these cellular changes and thereby inflicts "injury." See, *e.g.*, *Stonewall Ins. Co.* v. *Asbestos Claims Management Corp.*, 73 F.3d 1178, 1197-1199 (2d Cir. 1995) (citing evidence that asbestos inhalation "immediately" causes two kinds of "injury" to lung tissue — "inflammation and scarring" and cancerous "mutations"), modified, 85 F.3d 49 (2d Cir. 1996).[12]

[12] See also *Lloyd E. Mitchell, Inc.* v. *Maryland Cas. Co.*, 595 A.2d 469, 475-778 (Md. 1991) (collecting similar decisions by the Second, Third, Fifth, Sixth, Eleventh, and D.C. Circuits and by other state courts); *J.H. France Refractories Co.* v. *Allstate Ins. Co.*, 626 A.2d 502,

In fact, respondents' own expert testified below that, upon inhaling asbestos fibers, each class member suffered "a mechanical injury to the cells and to the adjoining tissue." J.A. 839; see also J.A. 835-837. In short, the district court correctly held that "the exposure-only plaintiffs have alleged a demonstrable physical injury which satisfies the Article III injury in fact requirement." J.A. 201; see also *Agent Orange*, 996 F.2d at 1434 (persons exposed to Agent Orange have injury in fact, given that "[s]ome types of injury to the body occur prior to the appearance of any symptoms") (citation omitted).

Second, the complaint alleges that class members have suffered "the necessity to undergo medical surveillance in order to detect the onset of any future asbestos-related conditions." J.A. 16. This claim too was supported by expert testimony. See J.A. 135; 3/8/94 Tr. 188-189. Many courts have held that the need to undergo testing itself constitutes "injury"[13] and gives rise to a cause of action (see page 20 *infra*); thus it surely is sufficient for Article III as well.

Third, the complaint alleges that each class member also suffers from an "enhanced risk of contracting" cancer and other diseases. J.A. 16. It is settled that the increased risk of diseases caused by exposure to a toxin constitutes "injury in fact." In *Duke Power*, 438 U.S. at 74, the Court held that exposure to radiation constituted Article III injury, given the "uncertain[] * * * health and genetic consequences" of such exposure.[14] Contrary to

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505-506 (Pa. 1993) ("exposure to asbestos causes immediate 'bodily injury'").

[13] See, *e.g.*, *Friends For All Children, Inc.* v. *Lockheed Aircraft Corp.*, 746 F.2d 816, 824-826 (D.C. Cir. 1984); *Hansen* v. *Mountain Fuel Supply Co.*, 858 P.2d 970, 977-978 (Utah 1993); *Ayers* v. *Township of Jackson*, 525 A.2d 287, 309-311 (N.J. 1987).

[14] See also cases cited by the district court at J.A. 197-200 & n.10; *Metropolitan Wash. Airports Auth.* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 264-65 (1991) (potential "increased noise, pollution, and danger" are sufficient for standing); *Helling* v. *McKinney*, 509 U.S. 25, 33-35 (1993) (recognizing claim based on

respondents' argument that this was "dictum," Professor Tribe has described *Duke Power* as having held that "the possible health and genetic consequences of emissions of nonnatural radiation into the environment" constitute Article III injury.[15] The plaintiffs here allege far more direct and personal toxic exposure than in *Duke Power*; and the "enhanced risk" claim in this case was factually supported by expert testimony that "anybody who's had occupational exposure to asbestos is at an increased risk for developing lung cancer." 2/4/94 Oliver Dep. 39; see also J.A. 135 (testimony of Dr. Kurt).

The Windsor respondents argue half-heartedly (at 21-22) that one of the prudential requirements for standing is not met because the "exposure-only" class representatives are not "best suited" to assert the disease-based claims that absent class members may have in the future. But it is clear that each class member *is* the "best suited" person — indeed, the *only* person with standing — to assert his or her present claims seeking relief for medical monitoring, fraudulent misrepresentation, emotional distress, and increased risk of disease.[16]

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exposure to second-hand smoke). In *Metro-North Commuter R.R. Co.* v. *Buckley*, S. Ct. No. 96-320, which presents claims under FELA by a person exposed to asbestos, the defendant has not even argued that the plaintiff lacks Article III standing.

[15] TRIBE, CONSTITUTIONAL CHOICES 107 (1985). As the district court explained (J.A. 194-197), respondents' efforts to distinguish *Duke Power* are meritless. For example, it is *easier* to establish standing to seek damages than an injunction. *Los Angeles* v. *Lyons*, 461 U.S. 95, 105 n.6 (1983); *Adarand Constructors, Inc.* v. *Pena*, 115 S. Ct. 2097, 2104 (1995).

[16] Respondents' suggestion (at Windsor Br. 22 n.17) that, to have standing, each plaintiff must show a valid cause of action under the law of every state, confuses issues of jurisdiction with those relating to the merits. As the district court discussed in detail (J.A. 187-193), standing focuses on injury, causation, and redressability, not on the merits of the plaintiff's claims. See *Hagans* v. *Lavine*, 415 U.S. 528, 542 (1974).

2. *The "redressability" requirement is satisfied.*

Respondents contend (Windsor Br. 23-26) that the "redressability" requirement for standing is not met because the settlement will not redress the "exposure-only" class members' injuries. This argument is frivolous. The district court found that the benefits of the settlement to non-impaired class members directly and fairly remedy those class members' alleged injuries. Pet. App. 173a-176a, 268a, 270a; *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 642 n.10 (1975) (eligibility for benefits is "in the nature of insurance, providing present security and peace of mind"). In any event, redressability focuses on whether the injury is "likely to be redressed by the requested relief" as set forth in the complaint (*Metropolitan Wash. Airports Auth.*, 501 U.S. at 264 (citation omitted)), not on the relief that is ultimately obtained in a settlement. In this case, as the district court observed, "it is self-evident that the very conventional remedy sought by the plaintiffs [in their complaint] — money damages — would do much to redress their injuries." J.A. 203.

3. *The class representatives' testimony confirms that they have standing.*

Wrenching portions of testimony wholly out of context, the Windsor respondents argue (at 17-18) that the named plaintiffs disavowed any present injury and any present claim for relief. In fact, the named plaintiffs testified that they have *present* health and financial problems resulting from asbestos exposure and that they require *immediate* relief.

Timothy Murphy testified that he was "sure" there has been "some damage" to his body (J.A. 362), that he is concerned because "a lot of [asbestos companies] are going bankrupt" (*id.* 363), and that he wants to be "sure that those companies are still able to pay" him when he gets sick (*ibid.*). Ambrose Vogt testified that, having seen "an awful lot of members of my local get sick and die from asbestos related diseases" (*id.* at 671), he fears that it is now "a gamble of what you're really going to get" (*id.* at 672); he wants to be "certain there's going to be plenty of money left to compensate" him. *Id.* at 395. When asked whether he authorized a suit for "damages," Vogt replied: "Just this one" (*id.* at 394). Ty Annas testified that he is "concerned" that the "asbestos

that [he] inhaled * * * may be causing damage" (*id.* at 419) and that he has "concerns for [himself] and [his] children" (*id.* at 683). He is worried because, in the tort system, "[c]ases * * * are being tied up" (*id.* at 690), the money may "run out" (*id.* at 692), and there are statute of limitations problems (*id.* at 686); thus the practical need for money is "driv[ing]" his claim (*id.* at 417). Carlos Raver testified that he has "asbestos in my lungs" and is "sick now" (*id.* at 372), that he needs something to "protect [him] from the * * * statute of limitations" (*id.* at 377), and that he does not "want [his] wife to have to go without the necessities and everything that [he] could provide for her" (*id.* at 371). Robert Georgine, who affirmed that he had "fil[ed] a lawsuit for damages" in the "present case" (*id.* at 449), testified that he has "concerns" as to his future health (*id.* at 746) and as to what will happen to him if he does "contract a disease" (*id.* at 754).

The class representatives never renounced their demands for immediate relief. Instead, they testified that, in settling their claims, they had secured such relief. Pet. App. 175a. Georgine said that "I got this whole system that has been developed here. I got peace of mind. I got the knowledge that if anything does go wrong, I have a right to file a claim and that it will be honored." J.A. 746-747. Murphy testified that the settlement "will set back money so in case people like myself develop mesothelioma, there will be money set aside for me." *Id.* at 364. Raver testified that the settlement "would give me great peace of mind, if I do need money down the road, that * * * I would be taken care of." *Id.* at 374. Vogt explained that the settlement makes him "feel a little more secure in the fact that there would be money for me if I ever had a claim in the future." *Id.* at 672. And Annas testified that "[i]f there is a situation down the road five years from now with me, and my asbestos exposure develops into an impairment, certainly I can go" for compensation. *Id.* at 694.

In sum, the named plaintiffs did not testify that there is nothing wrong, that they have no present demands for relief, or that they would have abandoned their claims if unable to secure a settlement providing the economic protection they need. Instead, as the district court found, they simply testified "to the effect that they support the deferral of compensation" under that settlement. Pet. App. 93a n.2.

B. The Amount-In-Controversy Requirement Is Satisfied.

1. Each class member satisfies the requirement.

The amount-in-controversy test is met unless "from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed." *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 289 (1938). Neither events occurring subsequent to the institution of suit nor the existence of a valid defense to the claim can oust the court's jurisdiction. *Id.* at 289-290. And given the "legal certainty" standard, a claim must be counted "if it is unclear whether the local law permits recovery." 14A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3702, at 53 (1985). Given the fundamental distinction between jurisdiction and the merits, "it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction," at least where the claim is not "completely devoid of merit." *Hagans*, 415 U.S. at 542-543 (citation omitted).

The complaint here asserts seven causes of action for each class member (J.A. 15-21), seeks unliquidated compensatory and punitive damages (*id.* at 21), and alleges that "[t]he amount in controversy exceeds $100,000 * * * for each" class member (*id.* at 5). As the district court found (*id.* at 204-216), there can be no "legal certainty" that any class member's claims were for less than $50,000.

As of the date the complaint was filed, courts in many states had recognized a negligence or strict liability claim for medical monitoring on behalf of a person exposed to a toxin, and no state had foreclosed such a claim.[17] This remains true today.[18] Thus,

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[17] See, *e.g.*, *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 850-852 (3d Cir. 1990) (citing other decisions); Blumenberg, *Medical Monitoring Funds*, 43 HASTINGS L. REV. 661, 678-83 (1992); Slagel, *Medical Surveillance Damages*, 63 IND. L.J. 849, 862-865 (1988); CCR Ct. App. Br. Attachment A.

[18] The only monitoring cases cited by respondents (WLA Br. 24) involved federal courts predicting what state law might turn out to be, which hardly amounts to "legal certainty." *Ball* v. *Joy Technol., Inc.*, 958 F.2d 36 (4th Cir. 1991); *Fried* v. *Sungard Recovery Servs., Inc.*, 936 F. Supp. 310, 311 (E.D. Pa. 1996).

as the district court ruled (J.A. 211), the monitoring claim asserted in the complaint (*id.* at 19-20) is viable for all class members. And while respondents contend that monitoring claims cannot by themselves provide the requisite amount, monitoring claimants have in fact recovered large sums.[19]

The complaint also alleges the intentional tort of "willfully, knowingly, and fraudulently suppressing knowledge about the dangers of asbestos" (J.A. 20). Such claims are widely recognized under the common law, see RESTATEMENT (SECOND) OF TORTS § 557A (1981), and such claimants may seek general damages for "bodily harm" — defined as the "alteration" of the body "to any extent."[20] Plainly there is no "legal certainty" as to the amount a jury might award based on plaintiffs' claims for alleged "cellular changes," including scarring and mutation of lung tissue. And given the rapidly changing law in this area, the plaintiffs' claims for emotional distress and enhanced risk (J.A. 18-19) cannot be rejected to a "legal certainty" either.

Finally, the complaint seeks punitive damages on behalf of all class members. See *Bell* v. *Preferred Life Assur. Society*, 320 U.S. 238, 240 (1943). Claims for both medical monitoring and punitive damages are frequently made together.[21] And we are aware of no

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[19] *E.g.*, *Potter* v. *Firestone Tire & Rubber Co.*, 25 Cal. Rptr. 2d 550, 558 (Cal. 1993) (over $142,000 awarded to four monitoring claimants). Moreover, the value of monitoring claims may be aggregated for jurisdictional amount purposes. *Gibbs* v. *E.I. DuPont de Nemours & Co.*, 876 F. Supp. 475, 479 (W.D.N.Y. 1995).

[20] RESTATEMENT (SECOND) OF TORTS § 15 and cmt. (a). The amount of injury needed to support a claim for damages is less in intentional tort cases. See KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 8, at 37 (5th ed. 1984).

[21] See, *e.g.*, J.A. 212 & n.20 (citing cases); *Potter*, 25 Cal. Rptr. 2d at 558 (jury awarded both); *In re Fernald Litig.*, No. C-1-85-149, 1989 U.S. Dist. LEXIS 17764, at *4 (S.D. Ohio Sept. 29, 1989) (advisory class action verdict of $80 million for medical monitoring and $55 million

state that prohibits punitive damages for medical monitoring and fraudulent misrepresentation — particularly where the defendants' conduct is alleged to be "reckless, wanton, and willful and in conscious disregard of [the plaintiffs'] safety and health" (J.A. 20). Punitive damages are invariably sought by asbestos plaintiffs in all kinds of cases and can result in large awards.[22]

In these circumstances, it is not surprising that courts in other nationwide class actions involving "exposure-only" claimants have uniformly held the amount-in-controversy requirement satisfied. See *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 729, 734 (2d Cir. 1992), modified, 993 F.2d 7 (2d Cir. 1993); *Agent Orange*, 996 F.2d at 1433-1434; *In re A.H. Robins Co.*, 880 F.2d at 723-25 (Dalkon Shield).

2. The court also has supplemental jurisdiction over the "exposure-only" class members.

Even if an individual class member's claims were for less than the jurisdictional amount, those claims would still be properly before the district court. In *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), this Court held that each class member in a diversity case must individually satisfy the amount-in-controversy requirement. But 28 U.S.C. § 1367(a), enacted in 1990, provides in pertinent part:

> in any civil action, of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of

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in punitive damages).

[22] See, e.g., *Dunn* v. *Hovic*, 1 F.3d 1371, 1385-91 (3d Cir.) (en banc) (upholding punitive damage award of $1 million for single asbestos plaintiff and noting prior asbestos punitive damage awards totaling hundreds of millions of dollars), modified, 13 F.3d 58 (3d Cir. 1993). Claimants from states that generally do not allow punitive damages may claim special circumstances or argue that the law of a state permitting punitive damages should be applied. See *Ahearn* v. *Fibreboard Corp.*, No. 6:93CV526, 1995 U.S. Dist. LEXIS 11523, at *8-9 (E.D. Tex. July 27, 1995).

> the same case or controversy * * * . Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

Thus, so long as the claims of at least one class member satisfy the amount-in-controversy requirement — such that the court has "original jurisdiction" over those claims — the court also has "supplemental jurisdiction" over the claims of all other class members. Both courts of appeals to address the issue have agreed that § 1367, by its plain terms, overrules *Zahn*. See *In re Abbott Laboratories*, 51 F.3d 524, 529 (5th Cir. 1995); *Stromberg Metal Works, Inc.* v. *Press Mechanical, Inc.*, 77 F.3d 928, 931 (7th Cir. 1996).

The WLA respondents argue (at 26 n.13) that § 1367 does not apply here because "none of the named plaintiffs have the requisite amount in controversy." But this ignores the class representatives who asserted claims for *present* injuries and the many other *presently sick* class members. See Pet. App. 103a-105a. Clearly, each of those plaintiffs has a claim for the requisite amount, and because the court has "original jurisdiction" over their claims, it has supplemental jurisdiction over the claims of the "exposure-only" class members.[23]

C. This Is Not A "Feigned," Non-Justiciable Lawsuit.

As the district court correctly held (J.A. 216-223), and as the Fifth Circuit agreed in rejecting the same contention in another settlement class action (*In re Asbestos Litig.*, 90 F.3d at 988-889), respondents' argument that this is a "feigned," non-justiciable case is meritless. To be justiciable, a case simply must "touch[] [on] the legal relations of parties having adverse legal interests" (*Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937)) and seek "a final judgment altering [their] tangible legal rights" (*ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 619 (1989)).

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[23] Respondents do not dispute that the claims in this case "form part of the same case or controversy under Article III." 28 U.S.C. § 1367(a). As the Court held in *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966), claims are part of one "case" if they "derive from a common nucleus of operative fact." Here, all class members allege injuries resulting from a single conspiracy among the defendants (J.A. 20).

The present case easily satisfies those standards. As the district court found in a decision not disturbed by the Third Circuit, "it is clear that the plaintiffs and the CCR defendants are true adversaries." J.A. 222. Persons occupationally exposed to asbestos have sued petitioners more than 100,000 times. Pet. App. 144a; see also *id.* at 106a-110a. The complaint *in this case* alleges that all class members have been injured by petitioners' tortious conduct and seeks enormous compensatory and punitive damages. J.A. 16, 21. Counsel for the parties *in this case* engaged in "protracted," "vigorous," and "arms-length adversarial negotiations" over the proposed settlement. Pet. App. 118a, 271a. And, under the settlement *in this case*, petitioners will pay up to *$1.3 billion* to the plaintiffs during the first 10 years alone (*id.* at 269a) — with much of that money going to persons who today have no manifested disease (*id.* at 175a-176a). Moreover, the judgment will sharply alter the parties' tangible legal rights: among other things, petitioners waive their defenses to liability, class members settle their claims, and petitioners agree to pay a large sum of money to the class.[24]

Thus, as the district court found (J.A. 218), this case is "the opposite of the type" of case on which respondents rely, in which the parties shared the same legal interests and were not settling any genuine dispute. Indeed, in *Muskrat* v. *United States*, 219 U.S. 346, 361 (1911), this Court distinguished such a case from lawsuits that — like this one — "demand compensation for alleged wrongs because of action upon [the defendant's] part."[25]

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[24] Accord *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d at 739 (holding that asbestos defendants and a class of asbestos plaintiffs — including "exposure-only" claimants — have interests that are "profoundly adverse to each other"). Whether or not the plaintiffs and defendants also are engaged in a "Marxist * * * class struggle" (Windsor Br. 16) is beside the point.

[25] The existence of adverse interests among the parties is further shown by the presence of class members who oppose the settlement and who litigated virtually every issue in the case — which itself is sufficient to demonstrate an Article III "case or controversy." See *INS* v. *Chadha*, 462 U.S. 919, 939 (1983).

Respondents contend (WLA Br. 29-30; Windsor Br. 12-13) that because the settlement was negotiated before the complaint was filed, the requisite adversity of interests was not present when the case began. But as the district court recognized (J.A. 220-221, 223), the existence of a proposed settlement does not make a class action non-justiciable, since the settlement must be approved by the court and will thereafter become part of a prospective decree.[26] In addition, the district court correctly noted (*id.* at 218-219) that there have been many cases in which parties with adverse interests reached a tentative settlement through *pre-lawsuit* negotiations and then filed that proposed settlement at the same time as the complaint.[27] Those cases show that the timing of the settlement negotiations simply "does not change the adversarial nature of the disputes which the settlement resolves." *In re Asbestos Litig.*, 90 F.3d at 988; accord 13 FEDERAL PRACTICE AND PROCEDURE § 3530, at 320. In short, as the district court found, "this case is one involving genuinely adverse interests"; it merely "lacks a dispute as to the remedy." J.A. 222.

Respondents' argument that the case is feigned because petitioners "selected" class counsel (Windsor Br. 11; see also WLA Br. 33) is flatly refuted by the district court's findings. Numerous federal and state judges and the MDL panel had urged the parties to explore a global settlement (Pet. App. 111a, 270a). Petitioners simply "continue[d] the discussions" toward such a settlement that

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[26] See, *e.g.*, *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 371 n.10 (1982); *In re Asbestos Litig.*, 90 F.3d at 988; see also 2 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS § 11.21, at 11-30 (3d ed. 1992) ("lack of a controversy may not be raised as a valid objection to a class action brought on a prelitigation settlement").

[27] See *Swift & Co.* v. *United States*, 276 U.S. 311, 326 (1928), and other cases cited by the court at J.A. 219-221. The Windsor respondents try (at 16 & n.12) to distinguish these cases as involving injunctive relief. But neither *In re Asbestos Litig.*, 90 F.3d 963, nor *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, involved injunctive relief. Moreover, that distinction does not change the fact that the parties in each of those cases were not disputing the appropriate resolution when the case was filed. In any event, the settlement here will take the form of a prospective injunction. J.A. 220-221. See also *id.* at 52.

already were underway with class counsel, whom Judge Weiner had appointed to serve as co-chairs of the plaintiffs' MDL steering committee following their election by their peers (*id.* at 115a, 177a-179a). Indeed, it would have been suspicious had petitioners negotiated with anyone else. Petitioners "continue[d] the discussions" with class counsel not for any collusive reason (*id.* at 115a, 179a), but because if they "wanted to succeed in reaching a global settlement that a Court would approve, they had no choice but to hope to negotiate with such counsel" (*id.* at 258a). Class counsel and petitioners thereafter engaged in "arms-length adversarial negotiations" (*id.* at 271a) that "were difficult, lengthy, and time-consuming" (*id.* at 116a).[28]

In short, neither the identity nor the conduct of class counsel supports respondents' argument. See *In re Asbestos Litig.*, 90 F.3d at 988-989. This case simply bears no relation to the ones, relied on by respondents, in which one party was dominated by the other and had no role in shaping the outcome of the dispute.[29]

D. Notice To The Class Satisfied Rule 23 And Due Process.

Rule 23(c)(2) requires that class members be given "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The district court made extensive findings establishing that "the individual notice campaign and the notice by publication campaign together are designed to reach the maximum number of class members." J.A. 300. The court also found that the notice was both "extensive and expensive," involving over 700,000 individual notices, notices in union publications that were delivered to more than 6 million union members and retirees, and a multi-

[28] Although the WLA respondents persist in arguing (at 30-31) that class counsel had agreed not to litigate "exposure-only" claims against petitioners if the settlement is not approved, the Third Circuit recognized that this issue had been resolved against respondents "largely on the basis of fact findings that [respondents] have not challenged" (Pet. App. 49a).

[29] As the district court recognized, petitioners' agreement to pay class counsel's fees — in an amount to be fixed *by the court* — is "standard practice" in class actions. J.A. 222 (citing numerous cases).

million dollar television and newspaper advertising campaign that reached millions more. Pet. App. 218a-219a, 267a, 272a. Notably, respondents did *not* deny before the Third Circuit that the express requirements of Rule 23(c)(2) were satisfied.[30]

Instead, respondents argued that the notice here denied class members due process despite its compliance with Rule 23(c)(2). But Rule 23(c)(2) was specifically designed to satisfy due process. See *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 173-74 (1974). The district court, moreover, was "confident that due process has been * * * given to the class" (Pet. App. 272a; see also J.A. 309-314), and the adequacy of notice is, in large part, a discretionary decision turning on the assessment of many facts. See 7B FEDERAL PRACTICE AND PROCEDURE § 1786, at 188. As we now show, the district court did not abuse its discretion in this case.

In *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-315 (1950), this Court held that due process requires notice that is "reasonably calculated, under all the circumstances, to apprise interested parties" of the action or, where such notice is not "reasonably permit[ted]," then notice in a form "not substantially less likely to bring home notice than other of the feasible and customary substitutes." Both Rule 23(c)(2) and *Mullane* make it clear that classwide notice will be valid even if not received by some class members.[31] A corollary — as shown by this Court's emphasis on the "best notice practicable" and "reasonable efforts" under "all of the circumstances" — is that the adequacy of notice is not measured by exceptional cases. Cf. *Walters* v. *National*

[30] Hence, *none* of their present complaints about the contents or dissemination of the notice (many of which are factually inaccurate) is properly before this Court.

[31] See *Eisen*, 417 U.S. at 166-67, 175 (requiring individual notice only to reasonably identifiable class members, with four million other members notified by publication only); *Mullane*, 339 U.S. at 317 ("in the case of persons missing or unknown," due process requires only "employment of an indirect and even a probably futile means of notification"). See also Kaplan, *Continuing Work of the Civil Committee*, 81 HARV. L. REV. 356, 396 (1967) ("perfect notice" to class members is "unnecessary" because of other protections in Rule 23).

Ass'n of Radiation Survivors, 473 U.S. 305, 330 (1985) (a procedure "must be judged by the generality of cases to which it applies"); *Parham* v. *J.R.*, 442 U.S. 584, 616-17 (1979).

Respondents, echoing the court of appeals, advance three arguments as to why notice was insufficient. WLA Br. 38-41; Cargile Br. 36-42; Balonis Br. 28-31; Pet. App. 55a-56a. Each attempts to substitute unsupported speculation for the district court's factual findings; none is sufficient to invalidate the notice here.

First, respondents repeat the Third Circuit's conjecture that "exposure-only plaintiffs *may* not know that they have been exposed to asbestos." Pet. App. 55a (emphasis added). But the district court *in fact* found that "after more than 20 years of extensive litigation, over 15 bankruptcies (many with extensive notice), and massive publicity about asbestos, persons who have had occupational exposure to asbestos are aware of that exposure." J.A. 311. Moreover, the notice here included "[a] list of asbestos-containing products and occupations where exposure to these products potentially occurred" (*id.* at 302-303), further helping individuals to determine their membership in the class (*id.* at 309, 311).

The court of appeals cited the testimony of two wives of mesothelioma victims and then surmised that "[m]any" class members "*may* have no knowledge of the[ir] exposure." Pet. App. 55a (emphasis added). That testimony represents a minority of even the anecdotal evidence,[32] and is plainly insufficient to refute the district court's overall factual finding. In every class action there are *some* class members who do not realize that they are part of the class, yet that does not invalidate a Rule 23 notice.

Second, respondents repeat the Third Circuit's suggestion that class members who are not sick "*may* pay little attention to class action announcements." Pet. App. 55a (emphasis added). The district court, however, found that there has been "massive publicity about asbestos" (J.A. 311), making class members aware of the

[32] Another wife of a mesothelioma victim was aware of her husband's asbestos exposure before his diagnosis (1/6/94 Baumgartner Dep. 13-14), and several Cargile respondents submitted affidavits indicating that, prior to their illnesses, each would have known that he had had occupational exposure to asbestos (J.A. 921-923).

serious health and legal consequences of their exposure. The district court also ordered that all of the notice materials prominently emphasize that individuals occupationally exposed to asbestos are class members whether or not they are currently sick. J.A. 308-309; see also *id.* at 229, 232, 268. In fact, tens of thousands of persons filed timely exclusion requests, confirming that class members did not simply treat the notice as "junk mail." The law "presume[s]" that a notice will be read and will "prompt an appropriate inquiry if it is not fully understood." *Atkins* v. *Parker*, 472 U.S. 115, 131 (1985). The Third Circuit's contrary suggestion would invalidate every Rule 23 notice.

Third, respondents repeat the Third Circuit's assumption that non-impaired class members "*may* lack adequate information to properly evaluate whether to opt out of the settlement." Pet. App. 56a (emphasis added). But the district court found that the notice materials "contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class." J.A. 307. Nor is the opt-out decision a blind gamble. Under the settlement, each class member's compensation will depend upon his or her particular disease and "all the factors" considered in the tort system (Pet. App. 137a) — thus avoiding any uncertainties that allegedly make the opt-out decision unfair.

Respondents theorize that it is unfair to require an opt-out decision before the full consequences of that decision are known. In litigation class actions, however, class members must decide whether to opt out before *anything* is known about the outcome of the case — which might be a complete defeat — and yet due process plainly is not offended. Because the notice here described the terms of the settlement in detail, class members had much *more* information concerning the consequences of their decision than class members do in such litigation cases.[33]

[33] Respondents' suggestion that due process requires that class members be given a second opportunity to opt out after developing a disease is wrong for the same reasons. Moreover, the settlement in fact allows belated opt-outs by "far" *more* class members than have rejected settlement offers and proceeded to verdict in the tort system. Pet. App. 150a.

Finally, respondents suggest that special due process rules should apply here because the settlement resolves "future" claims along with present ones. But most of the cases cited by respondents (*e.g.*, Balonis Br. 31 n.8) involved future *conduct* by the defendant. In this case, the defendants' conduct and its alleged impact on each class member had already occurred, and each class member had viable *present* causes of action — whether for medical monitoring, intentional misconduct, fear, or risk. Federal courts consistently have approved notices in cases resolving such claims. See, *e.g.*, *Agent Orange*, 996 F.2d at 1435 and 818 F.2d at 167-169; J.A. 312-313 & n.31 (citing cases).[34]

In sum, the notice here fully satisfied the requirements of Rule 23 and due process. To the extent that individual class members seek to present extraordinary circumstances justifying special relief, those arguments are properly addressed to the district court under Fed. R. Civ. P. 60(b) and cannot serve as a basis for invalidating the notice to the class as a whole.[35]

CONCLUSION

The judgment of the court of appeals should be reversed.

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[34] Respondents' analogy (*e.g.*, Balonis Br. 35) to the statute of limitations "discovery rule" adopted in *Urie* v. *Thompson*, 337 U.S. 163 (1949), is inapt. *Urie* turned on statutory construction, not due process. See *id.* at 169. Moreover, the claimant in *Urie* faced total forfeiture of all rights, whereas here all class members' interests were represented by the named plaintiffs and further protected by the district court, and the resulting settlement secures rather than forfeits their rights.

[35] See, *e.g.*, *Silber* v. *Mabon*, 18 F.3d 1449, 1454-55 (9th Cir. 1994); see also *Matsushita Elec. Indus. Co.* v. *Epstein*, 116 S. Ct. 873, 890 n.11 (1996) (Ginsburg, J., concurring in part and dissenting in part).

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